

1 KAREN A. OVERSTREET
Bankruptcy Judge
2 United States Courthouse
700 Stewart St., Suite 6310
3 Seattle, WA 98101
206-370-5330
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5
6 IN THE BANKRUPTCY COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 In re
9

10 Walter Daniel Croney, Jr and
Wendy Lou Croney

11
12 Debtors.

Chapter 13

No. 11-10836

ORDER ON BUSINESS BANK'S
MOTION TO DISMISS

13 Creditor Business Bank moves to dismiss debtors' Chapter 13
14 case because debtors are ineligible for Chapter 13 under 11 U.S.C
15 § 109(e) because debtors owe \$770,030.52 under an unconditional
16 personal guaranty signed by Walter Croney, which puts debtors'
17 total unsecured debt over the statutory limit of \$360,475.

18 **FACTS**

19 Debtor Walter Daniel Croney, Jr. ("Debtor") is a member of
20 Cowboy Campsite LLC. ("Cowboy"). On August 4, 2008, Business Bank
21 loaned Cowboy \$705,000, secured by real property owned by the LLC.
22 The loan was guaranteed by each member of the LLC. Debtor did not
23 sign the Business Bank note in his personal capacity. Neither the
24 Cowboy loan nor the personal guarantee are secured by property
25 owned by debtors.

26 The Guarantee provides in relevant part:

Guarantor absolutely and unconditionally guarantees
full and punctual payment and satisfaction of the

1 indebtedness of Borrower to Lender, and the performance
2 and discharge of all Borrower's obligations under the
3 Note and Related Documents. This is a guaranty of
4 payment and not of collection, so Lender can enforce
5 this Guaranty against Guarantor even where Lender has
not exhausted Lender's remedies against anyone else
obligated to pay the indebtedness or against any
collateral securing the indebtedness, this Guaranty or
any other guaranty of the indebtedness.

6

7 Under this Guaranty, Guarantor's liability is unlimited
8 and Guarantor's obligations are continuing.

9

10 Except as prohibited by applicable law, Guarantor
11 waives any right to require Lender (A) to continue
12 lending money or to extend other credit to Borrower;
13 (B) to make any presentment, protest, demand, or notice
14 of any kind, including notice of any nonpayment of the
15 Indebtedness or of any nonpayment related to any
16 collateral, or notice of any action or nonaction on the
17 part of Borrower, Lender, any surety, endorser, or
18 other guarantor in connection with the Indebtedness or
19 in connection with the creation of new or additional
loans or obligations; (C) to resort for payment or to
proceed directly or at once against any person,
including Borrower or any other guarantor; (D) to
proceed directly against or exhaust any collateral held
by Lender from Borrower, any other guarantor, or any
other person; (E) to pursue any other remedy within
Lender's power; or (F) to commit any act or omission of
any kind, or at any time, with respect to any matter
whatsoever.

20 The Cowboy loan is in default. Notice of default was sent
21 to Cowboy's members on May 10, 2010. A general receiver was
22 appointed for the LLC in June 2010.

23 Debtors filed a petition for relief under Chapter 13 on
24 January 27, 2011. Debtors listed Business Bank as a secured
25 creditor on Schedule D, with a claim in an unknown amount secured
26 by property owned by Cowboy. The claim was not listed as disputed
or contingent. Business Bank was not listed on Schedule F, where

1 debtors listed \$96,999.64 in general, unsecured debt.

2 On March 16, 2011, Business Bank filed its Motion to Dismiss,
3 arguing that it holds a general unsecured claim against the
4 debtors which puts their total unsecured debt over the statutory
5 limit set forth in 11 U.S.C. §109(e).

6 **DISCUSSION**

7 Pursuant to Section 109(e),

8 Only . . . an individual with regular income and such
9 individual's spouse . . . that owe, on the date of the
10 filing of the petition, noncontingent, liquidated,
11 unsecured debts that aggregate less than \$ 360,475 and
noncontingent, liquidated, secured debts of less than
\$ 1,081,400 may be a debtor under chapter 13 of this
title.

12 11 U.S.C. §109(e).

13 The first part of the analysis under section 109(e) is
14 determining whether the debt owed to Business Bank is secured or
15 unsecured. Debtors listed the debt as secured on their Schedule
16 D. However, neither the Cowboy note nor the guarantee are secured
17 by any property owned by the debtors. In order for debt to be
18 considered secured, debtors must have an interest in the specific
19 collateral. *In re Brown*, 250 B.R. 382 (Bankr. D. ID 2000). In
20 this case, debtors do not have any ownership interest in the
21 property which is collateral for Business Bank's loan. For
22 purposes of analysis of debtors' eligibility for Chapter 13 under
23 Section 109(e), the debt to Business Bank must be considered
24 unsecured.

25 The next part of the eligibility analysis under section
26 109(e) requires determination of whether a debt is noncontingent.
A debt is noncontingent if all events giving rise to liability

1 occurred prior to the filing of the bankruptcy petition. *In re*
2 *Loya*, 123 B.R. 338, 340 (B.A.P. 9th Cir. 1991). "[T]he rule is
3 clear that a contingent debt is one which the debtor will be
4 called upon to pay only upon the occurrence or happening of an
5 extrinsic event which will trigger the liability of the debtor to
6 the alleged creditor." *Id.* (internal quotations omitted). When
7 a debtor is the guarantor on a bank loan to another and that loan
8 is in default on the date the bankruptcy petition is filed, the
9 debtor's liability as a guarantor is noncontingent for purposes
10 of § 109(e). See *In re Enriquez*, 315 B.R. 112, 121-22 (Bankr. N.D.
11 Cal. 2004).

12 In this case, the event which triggered debtor's liability
13 under the terms of the guarantee was a default on the Business
14 Bank note by Cowboy. Cowboy defaulted on the note pre-petition,
15 triggering debtor's liability under the guarantee pre-petition.
16 Based on this pre-petition default by Cowboy, the court finds that
17 as of the date of the debtors' petition, the debt owed to Business
18 Bank was noncontingent.

19 The final step in the analysis is determining whether the
20 debt is liquidated, because only noncontingent, liquidated debts
21 are included in the calculation under section 109(e). "[W]hether
22 a debt is liquidated turns on whether it is subject to ready
23 determination and precision in computation of the amount due".
24 *In re Fostvedt*, 823 F.2d 305, 306 (9th Cir. 1987). The concept of
25 liquidated debt involves analysis of the amount of the debt, not
26 the existence of liability. *In re Saunders*, 440 BR 336, 341
(Bankr. E.D. PA 2006).

1 In this case Business Bank argues that the debt is liquidated
2 because debtors' obligation under the guarantee agreement can be
3 readily determined. Pursuant to the terms of the guarantee,
4 debtor became unconditionally obligated for the full amount of the
5 Cowboy loan upon default by Cowboy. Business Bank argues that
6 pursuant to the terms of the guarantee, it is not required to look
7 to Cowboy or to the real property collateral before collecting
8 from debtor. Business Bank argues that it has a liquidated claim
9 against debtor for the full \$770,030.52 due under the Cowboy note.

10 Debtors argue that the debt owed to Business Bank is not
11 liquidated and should not be used in determining whether they are
12 eligible for Chapter 13. Debtors argue that they were not the
13 borrower on the note, and that until Business Bank liquidates its
14 collateral and a deficiency is established, there is no way to
15 determine the amount of the debt owed Business Bank on the
16 guaranty.

17 The term debt is defined in the Bankruptcy Code as
18 "liability on a claim." 11 U.S.C. §101(12). In turn, "claim"
19 is defined as a "a right to payment. . ." 11 U.S.C. §101(5).
20 State law generally determines what constitutes a claim.
21 *Hassanally v. Republic Bank (In re Hassanally)*, 208 B.R. 46, 49
22 (9th Cir. BAP 1997) (existence of claim is generally determined
23 by state law), citing *Butner v. United States*, 440 U.S. 48,
24 54-55, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979).

25 Under Washington law, a guarantee of payment of an
26 obligation without words of limitation or condition is
construed as an absolute or unconditional guarantee. *National*

1 *Bank of Washington v. Equity Investors*, 81 Wash. 2d 886, 918
2 (1973). In contrast, a conditional guarantee contemplates the
3 happening of a contingent event other than default of the
4 principal debtor as a condition of liability on the part of the
5 guarantor. *Id.* at 917; *Grayson v. Platis*, 95 Wash. App. 824,
6 831 fn. 1 (1999). Unlike a conditional guarantee, and absolute
7 guarantee imposes no duty upon the creditor to attempt
8 collection from the principal debtor before looking to the
9 guarantor. *See Century 21 Products, Inc. v. Glacier Sales*, 129
10 Wash. 2d 406 (1996); *Grayson v. Platis*, 95 Wash. App. at 831
11 fn. 2 (1999).

12 With an absolute guaranty, the guarantor is liable for the
13 full amount of his guaranty upon default by the primary
14 obligor. The guaranty in this case specifically states that it
15 is unconditional, and goes on to specifically waive any
16 requirement that Business Bank proceed against Cowboy, the
17 collateral, or any of the other guarantors. The guaranty does
18 not contain any provisions making debtor's liability contingent
19 on an event other than default by Cowboy. The guaranty is
20 clearly an unconditional or absolute guaranty under Washington
21 law. Therefore, under Washington law, debtor is liable for the
22 full amount of the debt guaranteed. The amount of the debt can
23 be readily determined by reference to the Cowboy note.
24 Therefore, the debt is liquidated for purposes of analyzing
25 eligibility under Section 109(e).

26 Finally, the debtors argue that even if this court finds
that the guaranty is an absolute guaranty which requires

1 payment of the full amount due on the Cowboy note, the guaranty
2 should not be enforced because it is an adhesion contract.
3 Debtor argues that the documents in this transaction were
4 prepared by Business Bank, that debtor did not negotiate the
5 terms of the guaranty, and that the unconditional language of
6 the guaranty was "hidden in a paragraph with another clause
7 allowing Business Bank to do whatever it wants at any time
8 regarding any matter whatsoever." Debtor argues that such a
9 provision is unenforceable, without citation to any law in
10 support of this contention.

11 In order to find a contract is an adhesion contract, the
12 court must find:

- 13 (1) whether the contract is a standard form printed
contract;
- 14 (2) whether it was prepared by one party and submitted to
the other on a 'take it or leave it' basis; and
- 15 (3) whether there was no true equality of bargaining
power between the parties.

16 *See Satomi Owners Association v. Satomi, LLC*, 167 Wn.2d 781,
17 815 n.26, 225 P.3d 213 (2009). For the contract to be
18 unenforceable, the adhesion contract must be procedurally
19 unconscionable. *Id.* At 814. In this case, debtors have failed
20 to put forth any evidence from which the court could find that
21 the contract in question was procedurally unconscionable.

22 The Court finds that debtors are liable for a
23 noncontingent, liquidated, unsecured debt in the amount of
24 \$770,030.52 to Business Bank. Accordingly, debtors' unsecured
25 debt exceeds the dollar limit set forth in 11 U.S.C. §109(e) and
26 debtors are not eligible for relief under Chapter 13.

Debtors' supplemental response, submitted April 13, 2011

1 [Dkt. #30], indicates that debtors are eligible for Chapter 7
2 relief and that if the court determines that they do not
3 qualify for Chapter 13 relief they request an opportunity to
4 convert to Chapter 7. The Court will enter an order converting
5 this case to a case under Chapter 7.

6 ///END OF ORDER ///

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10 United States Bankruptcy Judge
11 (Dated as of Entered on Docket date above)
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